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No. 88-1062

IN THE

Supreme Court of the United States

BEER WHOLESALERS, INC.,
Petitioner,

vs.

MILLER BREWING COMPANY, and
PHILIP MORRIS INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA
AND MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

J. Marquis Eastwood
*Michael J. Wahoske
David Y. Trevor
J. Thomas Vitt
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2600
Attorneys for Respondents
**Counsel of Record*

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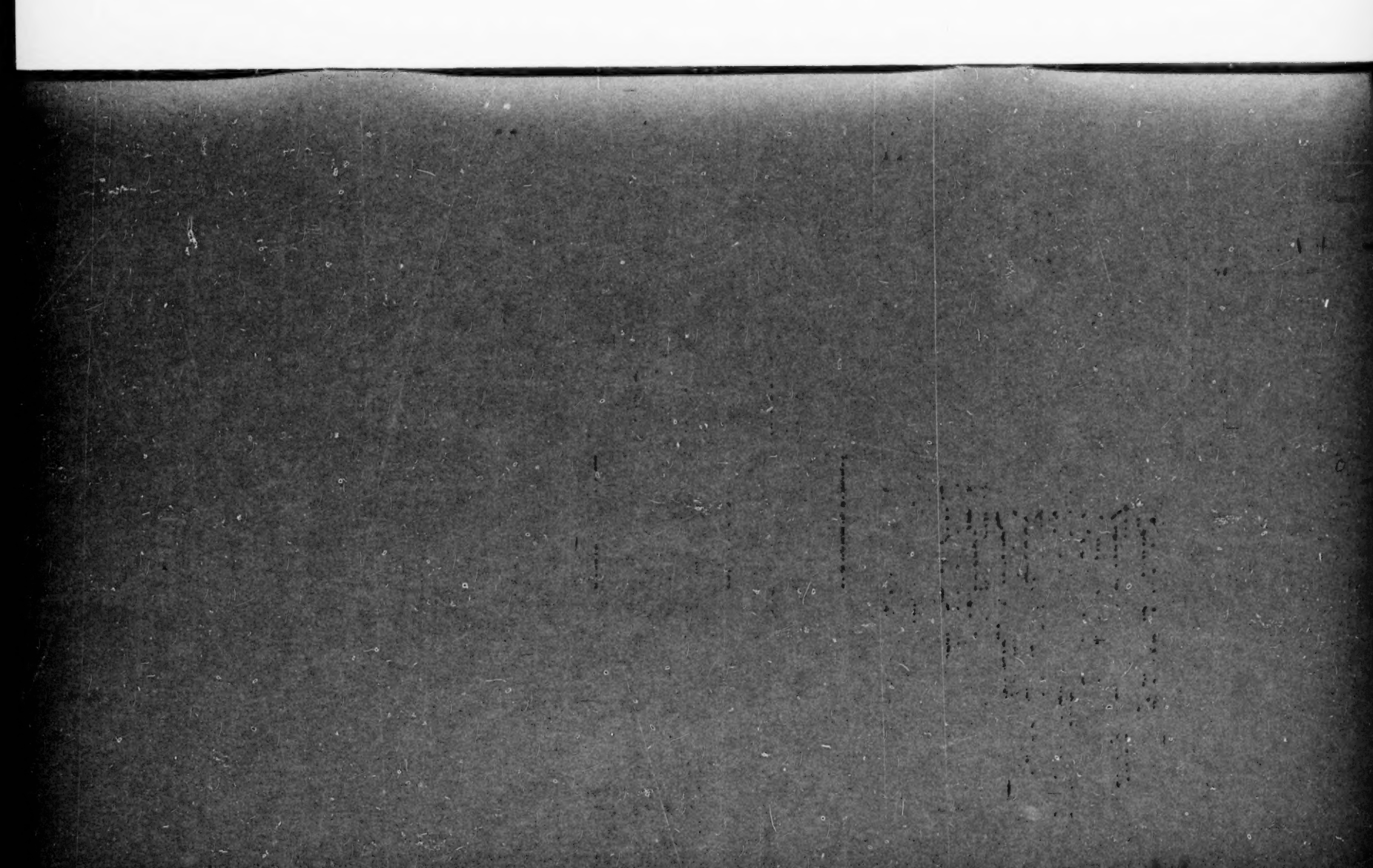

QUESTION PRESENTED

Whether a state appellate court, interpreting a state antitrust statute, in its review of a summary judgment granted under a state rule of civil procedure, correctly determined that Petitioner failed to show a genuine factual dispute as to the non-existence of a contract, combination or conspiracy necessary to support a claim under the state antitrust statute.

TABLE OF CONTENTS

	Page
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. This Court Does Not Have Jurisdiction To Review The Purely State Law Claims Of BWI	6
II. This Case Presents Only The Question Of Whether The Petitioner Presented Enough Evidence Of A "Contract, Combination, Or Conspiracy" To Survive A Motion For Summary Judgment	9
III. The Decision Below Is Correct	12
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	10, 11
BWI v. Miller Brewing Company, 426 N.W.2d 438 (Minn. App. 1988)	11, 12, 13, 15
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. ——, 99 L.Ed.2d 808, 108 S. Ct. 1515 (1988)	15
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	11
Freeman v. Bee Machine Co., 319 U.S. 448 (1943)	7
International Longshoremen's Association v. Davis, 476 U.S. 380 (1986)	7
Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 100 L.Ed.2d 193, 108 S. Ct. 1728 (1988)	10, 11, 13
Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988)	10, 11

Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151 (1934) 10
Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 13
Michigan v. Long, 463 U.S. 1032 (1983) 5, 7, 8
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 10, 12, 13, 14, 15
State v. Duluth Board of Trade, 107 Minn. 506, 121 N.W. 395 (1909) 9
Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977) 10

Statutes:

Minn. Stat. § 325.8011 3
Minn. Stat. § 325B.01-§ 325B.17. 3
Minn. R. of Civ. Pro. 56 7
15 U.S.C. § 1 2
15 U.S.C. § 15 7
28 U.S.C. § 1257(3) 1, 6

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JURISDICTION

Petitioner Beer Wholesalers, Inc. ("BWI") asserts that this Court has jurisdiction under 28 U.S.C. § 1257(3), but respondents Miller Brewing Company and Philip Morris, Incorporated (hereafter collectively referred to as "Miller")[1] contend that jurisdiction does not exist. As explained more fully on pp. 6-9, *infra,* Petitioner's claims were raised and decided entirely as matters of state law and

[1]Pursuant to Supreme Court Rule 28.1, Miller adopts by reference the listing of parents, subsidiaries and affiliates submitted in its previously filed Brief in Opposition to BWI's Petition for Extension of Time in which to petition for certiorari.

present neither constitutional issues nor other federal questions.

STATUTES INVOLVED

Petitioner's inclusion of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the "Statutes Involved" section of its Petition for Writ of Certiorari is in error. The Complaint in this case raises claims solely under Minnesota statutes and Minnesota common law. Petitioner deliberately elected not to pursue federal antitrust law claims. (*See* p. 3, *infra*).

STATEMENT OF THE CASE

On June 28, 1978, Miller sent BWI notice of its intent not to renew the Distributorship Agreement between the parties when that agreement expired of its own terms on October 8, 1978. The letter identified various deficiencies in BWI's operations. (Pet. App. 4). None of these deficiencies related to BWI's pricing decisions. Pursuant to the terms of the Distributorship Agreement, the relationship between Miller and BWI expired on October 8, 1978.

BWI brought an action in the United States District Court for the District of Minnesota alleging numerous causes of action, including an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. BWI sought an injunction to force Miller to reinstate the manufacturer/-distributor relationship, but the federal court denied the injunction. After this adverse ruling, BWI then brought an action in state court, alleging the same state claims but no federal antitrust claims, and sought and obtained a temporary restraining order. Miller removed the state court action to federal court. The federal court vacated the

injunction and, upon Miller's motion, directed BWI to refrain from seeking any further injunctive relief in state court. BWI then filed *another* complaint in state court, alleging the same state law claims but seeking money damages only. This third lawsuit is the case now before this Court. BWI also brought a motion to dismiss its federal lawsuit without prejudice, which was granted on December 5, 1978, on the condition that BWI not seek injunctive relief in any other action. BWI has never attempted to pursue its federal claims in the intervening ten years.

BWI's state court Complaint alleges numerous common law causes of action, a violation of the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. § 325B.01-§ 325B.17, and the Minnesota state antitrust statute.[2]

The period for discovery in the case ran from 1978 until BWI certified the case as ready for trial on August 29, 1986. Miller then brought a motion for summary judgment on all counts, which was heard by the Hennepin County District Court on September 22, 1987. Miller moved to dismiss the antitrust claim on the grounds that BWI had no evidence of a contract, combination or conspiracy.

In defense of its antitrust claim, BWI argued that Miller was involved in three different price-fixing conspiracies: (1) Miller-BWI; (2) Miller-East Side (another local distributor); and (3) a nationwide conspiracy. After nine years of litigation, the only "evidence" in support of its claim which BWI called to the court's attention was a single interrogatory answer it had prepared, setting forth

[2]Count Four of the Complaint asks the court to hold defendants "in violation of Minnesota Antitrust Law of 1971, Section 325.8011 *et seq.* and MSA 325B.09." BWI's claim that it has pursued its claims "under the decisions of this Court and other federal courts" (Pet. 5) is disingenuous: BWI's briefs have cited federal cases, but its cause of action was an alleged violation of the Minnesota state statute.

five or six incidents in the course of a five-year manufacturer/distributor relationship.[3] Each incident involved discussions between Miller and BWI only. BWI never presented any evidence of an agreement or conspiracy between Miller and any distributor other than BWI. In each of the incidents cited by BWI, BWI did not agree to the pricing strategy allegedly suggested by Miller. In none of the instances did BWI price its Miller products completely in accord with the supposed pricing demands of Miller. Finally, none of the incidents involve evidence of coercion by Miller, or anything more than legitimate expressions of concern by Miller over the pricing of its product. None of the alleged "threats" was ever carried out.

The trial court held that the record did not raise a genuine factual dispute as to the existence of a "contract, combination, or conspiracy," and granted summary judgment to Miller on BWI's state antitrust claim (as well as all other claims). The Minnesota Court of Appeals affirmed that decision, (Pet. App. 2), and the Minnesota Supreme Court exercised its discretion not to review the decision. (Pet. App. 22).

REASONS FOR DENYING THE WRIT

BWI's Petition for a Writ of Certiorari should be denied for three principal reasons. First, the case presents no federal question for this Court to decide. BWI proceeded below entirely on state law claims, which were decided by the state courts, under state rules of procedure, as matters of state law. Despite the fact that the courts below relied

[3]Plaintiff's Response to Defendants' Interrogatory 8. The incidents set forth in BWI's Statement of the Case (Pet. 8-13) are taken directly from this interrogatory answer.

on federal antitrust cases as analogous precedent, this case does not come within the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983). In *Michigan v. Long*, the question was whether the state court had actually decided an issue on the independently adequate ground of state constitutional law or as an issue of federal constitutional law. In the present case, there is no federal law at issue. The state court could only have been deciding issues of state law because only state law claims were presented to it.

Second, even if there were no jurisdictional defect, the case does not present issues worthy of a grant of certiorari. Petitioner's rendition of the "Questions Presented" invites this Court to engage in an at-large discourse about the current state of antitrust law. This litigation, however, presents only the issue of whether the Minnesota state courts accurately applied a state law summary judgment standard in determining that BWI had not presented adequate proof tending to show a conspiracy. The Minnesota Court of Appeals carefully analyzed each of the three conspiracies alleged by BWI, but simply found, based on the factual record, that BWI had no case. That judgment does not present a question worthy of a grant of certiorari.

Finally, certiorari is unwarranted because the lower courts correctly decided the case in Miller's favor. After nine years of discovery, BWI's entire antitrust case consisted of one self-serving interrogatory answer setting forth five or six instances in which Miller representatives allegedly made remarks about pricing to BWI over the course of five years. None of these instances demonstrated any agreement because in each instance BWI refused to make its pricing decisions in accordance with Miller's expressed desires. Moreover, where BWI made partial changes in its pricing,

those changes were never shown to have been coerced by Miller, and those pricing moves were consistent with independent behavior. Far from excluding the possibility of independent action, BWI succeeded in showing only that it had always priced independently of Miller's plans, and that Miller had expressed nothing more than a legitimate concern about prices. Summary judgment was clearly appropriate.

I.

This Court Does Not Have Jurisdiction To Review The Purely State Law Claims Of BWI.

This Court lacks jurisdiction to determine the issues raised by BWI's Petition for Certiorari. BWI invokes 28 U.S.C. § 1257(3), which provides for review by writ of certiorari in the following circumstances:

> Where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In other words, this Court may review claims made under the United States Constitution or under federal law, but not matters of purely state law.

In the present case, no federal law is at issue. Although BWI's Petition attempts to obscure the point, this lawsuit

does not involve any federal antitrust claims.[4] BWI made federal antitrust claims in its initial federal lawsuit, but dismissed those claims voluntarily more than a decade ago and never attempted to reassert them. Its state court lawsuit never contained federal antitrust law claims and, indeed, such claims could not be brought in state court. *See* 15 U.S.C. § 15; *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943).

Moreover, the case was determined on a motion for summary judgment pursuant to another state law, Minnesota Rule of Civil Procedure 56. Thus, both the substantive law governing BWI's claims and the procedural rules under which those claims were dismissed are entirely matters of state law.

As this Court has stated, "we have no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis*, 476 U.S. 380, 387 (1986). Because "purely state law" is the only thing presented by this case, there is no jurisdiction for this Court to hear it.

BWI attempts to create jurisdiction by relying on the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983), which holds that where there are both federal and state law questions presented, and where it is not clear that the state court's decision rests on an adequate and independent state ground, this Court has jurisdiction to review the federal questions presented. BWI claims that because the Minnesota state courts looked to federal case law interpreting

[4]BWI attempts to distract the Court from focusing on the lack of jurisdiction by implying that Justice Blackmun ruled on the jurisdictional issue by granting BWI's request for an extension of time to file its petition for certiorari. Justice Blackmun's Order, however, in no way purports to address this serious jurisdictional question, much less to answer it. (Pet. App. 1).

the analogous federal antitrust statutes to aid their interpretation of state antitrust law, the *Michigan v. Long* doctrine applies.

BWI's argument is a clear misreading of *Michigan v. Long,* which governs situations in which it is unclear whether federal law or state law determined the outcome of the case. Most frequently, it is applied in situations where the legality of an action (such as the police search at issue in *Michigan v. Long*) is challenged under similar provisions of both the state and federal constitutions. For the doctrine to apply, however, there must have been a possibly determinative federal law issue, leading to uncertainty as to whether state or federal law was the decisive issue in the mind of the state court.

Here, by contrast, federal law could not have been the basis for the state court's decision, because there are no federal law claims in the case. The federal case law cited by the Minnesota Court of Appeals could only have been used by way of analogy, because the Minnesota Court of Appeals was not being asked to rule on any issue of federal antitrust law, and, indeed, would not have had jurisdiction to determine such claims.

While the use of federal case law (and that of other states) to aid in the determination of Minnesota state antitrust law claims has been sanctioned by the Minnesota Supreme Court for 80 years, the Minnesota Supreme Court long ago made clear that such laws were only similar — not identical — to Minnesota law, and that cases construing these laws are to be used merely to help supply the principle upon which an interpretation of Minnesota state law can be based:

> The Minnesota antitrust law is framed along the lines of the federal statute, although it is more diffuse. It may fairly be assumed that the general purpose of all statutes of this kind is the same, and we may properly look to the decisions made under federal and state statutes of a similar character for the principle by which to construe our own statute.

State v. Duluth Board of Trade, 107 Minn. 506, 517, 121 N.W. 395, 399 (1909). The fact that Minnesota state courts encourage reference to a readily available body of analogous federal law does not convert a state law claim into a federal claim. The Minnesota Court of Appeals decision in this case represents a state court construing a state statute in the context of a motion for summary judgment under state rules of civil procedure. It presents no federal question for this Court to determine.

II.

This Case Presents Only The Question Of Whether The Petitioner Presented Enough Evidence Of A "Contract, Combination, Or Conspiracy" To Survive A Motion For Summary Judgment.

The Minnesota Court of Appeals upheld the trial court's determination that BWI did not present sufficient evidence of a "contract, combination, or conspiracy," to survive summary judgment on its claims under the Minnesota antitrust statutes. Despite BWI's myriad assertions to the contrary, the sole question presented is whether the Court of Appeals made the correct assessment of the evidence in the record before it. The opportunity to second-guess the two state courts' evaluations of the evidence opposing a summary judgment motion is simply not worthy of this Court's

discretionary grant of certiorari. *See* Supreme Court Rule 17.

BWI apparently argues that four issues in this case justify a grant of certiorari: (1) the continuing vitality of the *per se* rule against vertical price-fixing; (2) the status of *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), after this Court's decision in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); (3) an alleged conflict between the Seventh and Ninth Circuits created by the cases of *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 100 L.Ed.2d 193, 108 S. Ct. 1728 (1988), and *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988); and (4) whether BWI presented enough evidence of concerted action to survive a motion for summary judgment. In fact, however, issues (1), (2), and (3) are not presented here; the outcome of this case turned solely on the fact-bound determination made on issue (4).

Issues (1) - (3) are not presented for review because the Court of Appeals agreed with BWI's legal contentions but found no factual support for BWI's claims. BWI cannot appeal legal issues on which it *prevailed* below, and it cannot ask this Court to engage in unfettered discussions of issues it considers interesting. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977) ("our power is to correct wrong judgments, not to revise opinions"); *cf. Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934) (a party has no right to appeal from a decree in its favor in order to procure a review of the findings below).

On issue (1), BWI urges this Court to use this case to reexamine and reaffirm the *per se* rule against vertical

price-fixing and seems to imply that the Minnesota Court of Appeals decision called that rule into question. This is not true. The Court of Appeals stated flatly:

> Under federal antitrust law, vertical resale price maintenance is per se illegal . . . *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911).

BWI v. Miller Brewing Company, 426 N.W.2d 438, 442 (Minn. App. 1988) (Pet. App. 10). The continuing vitality of *Dr. Miles* and progeny is not an issue in this case.

Similarly, petitioner contends that the holding of *Albrecht* is somehow undermined by the decision below. But *Albrecht*'s holding was not challenged by the court below, which noted:

> An unlawful conspiracy can be established if a manufacturer coerces a distributor into a retail price schedule and the distributor acquiesces. *Albrecht v. The Herald Co.*, 390 U.S. 145, 150 n. 6 (1968).

Id., 426 N.W.2d at 443 (Pet. App. 11). This agreement with *Albrecht* does not merit review by this Court.

The last of BWI's phantom issues is the alleged conflict between the Seventh and Ninth Circuits. Petitioner's brief is devoid of argument explaining how this case involves or further illuminates that alleged conflict, except to claim that the Minnesota intermediate appellate court sides with the Ninth Circuit, apparently because the antitrust plaintiff lost here and in *Jeanery*. But the court below never cited *Jeanery*, while it did cite *Isaksen* and distinguished the facts of this case. To the extent BWI contends that *Isaksen* is a proper statement of federal antitrust law, the Minnesota Court of Appeals apparently agreed. *Id.*

The only question presented, then, is whether the Court of Appeals erred by holding that BWI did not present sufficient evidence of concerted action to survive a motion for summary judgment. As BWI apparently concedes, the trial court and the appeals court applied the proper standard. *Compare Monsanto,* 465 U.S. at 764 (antitrust plaintiff must present evidence that tends to excludes the possibility of independent action) *with BWI v. Miller,* 426 N.W.2d at 443-444 (Pet. App. 13-14). Stripped to its core, what remains is Petitioner's attempt to have this Court review the application of an admittedly correct standard to the unique facts of this case. Review of state court judgments on factual issues is not a proper reason to grant certiorari. *See* Supreme Court Rule 17.

III.

The Decision Below Is Correct.

Finally, certiorari should not be granted because there is no error to correct. BWI alleges that Miller was involved in three different price-fixing conspiracies: (1) Miller-BWI; (2) Miller-East Side (another local distributor); and (3) a nationwide conspiracy. The Minnesota Court of Appeals properly held that BWI failed to raise a genuine issue of material fact as to the existence of any of the alleged price-fixing conspiracies, and it affirmed the trial court's grant of summary judgment.

This Court set out the standard an antitrust plaintiff must meet to show a "contract, combination, or conspiracy" under the federal antitrust laws in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984):

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 764. The *Monsanto* standard applies to motions for summary judgment. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). A brief analysis of BWI's claims will show that this case was properly decided, even if it were a federal question case.

BWI's central focus, on appeal below and before this Court, is that Miller unlawfully coerced it into agreeing to a vertical price-fixing conspiracy. To show such a coerced agreement between a manufacturer and a distributor, the distributor must offer evidence of two things: (1) that it was forced to adhere to the manufacturer's request to fix prices by something more than the manufacturer's threat of termination, and (2) that the distributor agreed to and communicated acceptance of the manufacturer's requested course of action. *See Monsanto*, 465 U.S. at 764, n. 9; *see also Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987). BWI's evidence falls far short of showing any agreement between Miller and BWI to fix prices.

In its Petition to this Court, BWI sets out five alleged instances of coercion and vertical price-fixing by Miller. (Pet. at 8-13). By BWI's own admission, it completely rejected Miller's pricing demands in three of those instances. In the other two instances, BWI set its own price and did not fully comply with Miller's alleged demands. *BWI v. Miller Brewing Company*, 426 N.W.2d at 443 (Pet. App.

12). BWI does not set out a single incident where it agreed with Miller on the price to be charged, much less where it ever communicated any such agreement to Miller, as required by *Monsanto.*

Further, BWI, after more than a decade of litigation, has failed to produce evidence of a single instance where Miller coerced or threatened it. BWI relies on a remark allegedly made by a Miller executive to BWI that, if BWI charged $9.30 per case for domestic Lowenbrau, "that would be the RAPE of the Miller Brewing Company." (Pet. at 12). Even if that statement was made, it would not be an improper threat in view of this Court's recognition that it is perfectly proper for a manufacturer to express "strongly felt concern" about the resale prices of its products. *Monsanto* 465 U.S. at 763.

In the other instance where BWI allegedly changed its prices in response to Miller, Petitioner sets out the following exchange between Miller and BWI:

> Miller: When are you going to raise your prices?
>
> BWI: I have nothing definite on that.
>
> Miller: You had better raise your prices soon or the brewery will think that you don't need the money and they will raise their prices to you more. If you don't need the money then they'll take it.

(Pet. at 13). This exchange is hardly an improper "threat" in light of *Monsanto;* rather, Miller merely states that it may do what it has every right to do: raise its prices.

BWI's evidence does not raise a factual issue that Miller threatened or coerced BWI, that BWI ever agreed with Miller, or that BWI ever communicated any agreement to Miller.

BWI also contended below that a conspiracy existed between Miller and East Side, another local distributor, and that Miller was engaged in nationwide price-fixing. The Court of Appeals correctly held that BWI produced no evidence of any agreement, pricing or otherwise, between Miller and East Side. *BWI v. Miller Brewing Co.*, 426 N.W.2d at 444, (Pet. App. 13); *cf. Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. —, 99 L.Ed.2d 808, 108 S. Ct. 1515 (1988) (agreement between a manufacturer and a non-terminated distributor to terminate a price-cutting distributor is *per se* illegal only if they also agree on price). The basis for this holding was BWI's failure to produce any evidence beyond its own interrogatory answer. BWI had no proof that Miller ever agreed with East Side or any other distributor as to prices, alleged "dumping" of overage beer or any other matter pertinent to an antitrust claim. Indeed, BWI never explored the relationship between Miller and its other distributors in discovery. Despite the extraordinary length of this litigation, BWI never developed any proof of its second and third conspiracy theories.

In sum, Petitioner simply failed to present any evidence that "tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 764. The Court of Appeals decision was correct.

CONCLUSION

BWI has maintained this litigation for more than a decade with no evidence of an antitrust violation; it relies instead on a hodgepodge of random allegations unsupported by the record and the applicable law. Because the case presents no federal questions and no questions of any kind worthy of certiorari, and because the Minnesota Court of Appeals correctly affirmed the trial court's grant of summary judgment, Miller respectfully requests that the Petition for a Writ of Certiorari be denied.

Dated: January 23, 1989

Respectfully submitted,

J. Marquis Eastwood
*Michael J. Wahoske
David Y. Trevor
J. Thomas Vitt
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402
(612) 340-2600
Attorneys for Respondents Miller Brewing Company and Phillip Morris Incorporated
**Counsel of Record*